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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 258

JAMES JOINER,

Petitioner,

VS.

ROSETTA DECKARD,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

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JAMES JOINER,

Petitioner,

vs.

ROSETTA DECKARD,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, James Joiner, prays that a writ of certiorari issue to review a judgment of the Supreme Court of Illinois entered on January 21, 1970, dismissing his appeal from various orders of the Circuit Court of Winnebago County in a paternity proceeding.

Citation to Opinion Below.

The opinion of the Supreme Court of Illinois, printed in Appendix C hereto, infra, page 17a, is reported in 44 Ill. 2d 442, 255 N.E. 2d 900.

Jurisdiction.

The judgment of the Supreme Court of Illinois was entered on January 21, 1970. A timely petition for rehearing filed on February 11, 1970, was denied on March 23, 1970. Thereupon, the mandate which was issued on April 2, 1970, was recalled on April 9, 1970, and stayed pending the timely filing of a petition for certiorari in the Supreme Court of the United States and a final disposition of the same.

The jurisdiction of this court is invoked under 28 U.S.C. 1257(c).

The federal questions sought to be reviewed were raised in the trial court (e.g., motions to vacate R.C36, R.C61), and also in the reviewing court (e.g., brief, and petition for rehearing R.13).

Questions Presented.

1. Whether the Paternity Act is unconstitutional?

2. Whether the provisions of the Paternity Act relating to the issuance of a warrant, arrest, bond, imprisonment for neglect to give bond and security, contempt of court and imprisonment for contempt are void?

3. Whether the entire proceedings are void?

4. Whether the petitioner was deprived of his constitutional right to a fair trial?

5. Whether the trial court entered judgment that the petitioner is the father of the child?

6. Whether the trial court was without jurisdiction to enter the order of support, or of the order of contempt?

7. Whether it is the duty of the State's Attorney upon request of the woman, to file the complaint on her behalf and proceed forthwith in the enforcement of the Act?

8. Whether the judgment in favor of the plaintiff and against the defendant for $3,090.00 is void?

9. Whether the appeal was taken in apt time?

Constitutions and Statutes Involved.

The 14th Amendment to the Constitution of the United States, and also Sections 2, 12 and 19 of Article II of the Constitution of the State of Illinois are printed in Appendix A hereto, infra page 1a.

The Illinois Paternity Act is printed in Appendix B hereto, infra, page 2a.

Statement of the Case.

This is a paternity proceeding.

The action was instituted by Rosetta Deckard, plaintiff, against James Joiner, defendant, on February 3, 1962, in the Circuit Court of Winnebago County, it is believed, to establish the paternity of a child, which, if born alive, may be born out of wedlock, but it is alleged merely to enforce liability for its support, maintenance, education and welfare, and for her expenses during the period of her pregnancy, confinement and recovery.

The complaint is, as follows:

Now comes the Plaintiff, Rosetta Deckard, by Assistant State's Attorney, Alford R. Penniman, in and for the County of Winnebago, State of Illinois and says:

1. That the said Plaintiff is now pregnant with a child in the County of Winnebago, State of Illinois, which, if born alive, may be deemed by law "a child born out of wedlock" and that the said child was fathered by the Defendant, James Joiner, a resident of or who may be found in the County of Winnebago, State of Illinois.

2. That by reason of said pregnancy, confinement and recovery, various sums of money will be expended by the Plaintiff and in her behalf.

3. That if said child is born alive, various sums of money will be expended for the said child's support, maintenance, education and welfare by the Plaintiff and in behalf of the child.

4. That the said Plaintiff made a demand upon the said defendant to pay for her expenses incurred by said pregnancy, confinement and recovery and for the said child's support, maintenance, education and welfare, all of which the said Defendant has refused to do.

Wherefore, Plaintiff prays:

1. That the said Plaintiff be appointed guardian of said child and awarded the care, custody and control of said child.

2. That the said Defendant be ordered and decreed to pay sufficient sums of money for the Plaintiff's expenses incurred by her pregnancy, confinement and recovery and for the said child's support, maintenance, education and welfare.

~~3. That this Honorable Court issue forthwith a warrant for the arrest of the Defendant without notice and without bond, as provided in the State laws of the State of Illinois to bring the accused before the Court to answer this Complaint.~~

Rosetta Deckard
Plaintiff

(Verification) R.C2.

In an order filed on February 3, 1962, the trial court authorized the sheriff to take into custody and bring the defendant before the court forthwith. R.C5. A capias was issued. R.C7. He was arrested on March 26, 1962.

The amended complaint filed on March 27, 1962, is as follows:

Now comes the Plaintiff, Rosetta Deckard, by Assistant State's Attorney, Alford R. Penniman, in and for the County of Winnebago, State of Illinois, and says:

1. That the said Plaintiff was delivered in the County of Winnebago, State of Illinois of a male child, James Curtis Deckard, born January 17, 1962, which would be deemed by law "a child born out of wedlock" and that the said child was fathered by the Defendant, James Joiner, a resident of or who may be found in the County of Winnebago, State of Illinois.

2. That by reason of said birth, various sums of money have been and will be expended for the said child's support, maintenance, education and welfare by the Plaintiff and in behalf of the said child.

3. That the said Plaintiff has made a demand upon the said Defendant to pay for her expenses incurred by said pregnancy, confinement and recovery and for the said child's support, maintenance, education and welfare, all of which the said Plaintiff has refused to do.

Wherefore, Plaintiff prays:

1. That the said Plaintiff be appointed guardian of said child and be awarded the care, custody and control of said child.

2. That the said Defendant be ordered and decreed to pay sufficient sums of money for the Plaintiff's expenses incurred by her pregnancy, confinement and recovery and for the said child's support, maintenance, education and welfare.

3. That this Honorable Court issue forthwith a warrant for the arrest of the Defendant, James Joiner, without notice and without bond, as provided in the Statute

laws of the State of Illinois to bring the accused before the Court to answer this Complaint.

Rosetta Deckard
Plaintiff

(Verification) R.C9.

The defendant was first brought before the trial court on March 27, 1962. It appears that the defendant was requested to sign an acknowledgment of paternity. In it he purportedly acknowledged the paternity of the child, but it was not made under oath or affirmation as provided by the Paternity Act. R.C12.

In an order filed on the same day, the trial court ordered that the defendant is liable to the child for his support, maintenance, education and welfare and for the expenses of the mother during her pregnancy, confinement and recovery. The amount of support and expenses was reserved until the further order of the court. (R.C14. The court did not take any evidence relative thereto.

The trial court required the defendant to enter into a performance bond in the amount of $1,000.00, which he did. R.C16.

In an amended order filed on February 5, 1963, the trial court again ordered that the defendant is liable to the child for his support, maintenance, education and welfare and for the expenses of the mother during her pregnancy, confinement and recovery. R.C19. The defendant was ordered to pay the clerk $15.00 per week commencing February 16, 1963. He was further ordered to pay the doctor and hospital bills of the plaintiff during her pregnancy, confinement and recovery.

The plaintiff filed on August 16, 1966, a petition for citation for contempt because of the failure of the defendant to pay her $2,645.00. R.C22. After having partially heard the testimony on August 25, 1966, the court continued the petition to Sepember 30, 1966.

The plaintiff filed on September 21, 1967, a petition for rule to show cause because of the failure of the defendant to pay her $3,090.00. R.C31.

In an order entered on September 21, 1967, the trial court found the defendant in contempt and ordered him to purge himself by paying $15.00 per week commencing instanter. R.C33. The court continued the petition to October 26, 1967.

John R. Snively entered his appearance as attorney for the defendant on October 26, 1967. R.C34.

In an order entered on October 26, 1967, the court continued the petition to November 2, 1967.

The defendant filed on the same day a motion to vacate the order of September 21, 1967, finding him in contempt of court and ordering him to purge himself by paying $15.00 per week, the amended order of support of February 5, 1963, and the order of support of March 27, 1962, and to dismiss the action brought on February 3, 1962. R.C36.

The defendant filed on November 1, 1967, a motion to vacate the appearance of David L. Martenson as attorney for the plaintiff, and to dismiss the petition for rule to show cause filed on September 21, 1967. R.C39.

He also filed on November 1, 1967, an affidavit in support of the motion to vacate certain orders. R.C41.

In an order filed on November 24, 1967, the trial court held that the Paternity Act was constitutional, and having ruled on the constitutionality of the Act and the other points raised in the motion, the motion was denied. R.C48.

In an order entered on the same day, the trial court denied the motion to vacate the appearance of David L. Martenson as attorney for the plaintiff, and to dismiss the petition for rule to show cause. R.C50.

The defendant filed on December 1, 1967, a repudiation of the purported acknowledgment of paternity filed March 27, 1962. R.C51.

In a motion filed on the same day, the defendant moved to vacate the purported acknowledgment of paternity because he repudiated the same. R.C52.

In an order entered on December 1, 1967, and filed on December 29, 1967, the prayer of the petition for rule to show cause requesting that the defendant be held in contempt of court was denied. R.C53. The motion to vacate orders and for other relief was denied. The court rendered a judgment in favor of the plaintiff and against the defendant for $3,090.00.

The defendant filed on January 5, 1968, a motion to vacate the order filed on December 29, 1968. R.C56. The motion was denied on August 16, 1968.

The defendant filed on September 13, 1968, a motion to vacate all proceedings herein, together with the various purported orders and judgments, and to dismiss the petition for citation for contempt and for rule to show cause, the amended complaint, the original complaint, and the action brought on February 3, 1962. R.C61.

In an order filed on October 4, 1968, the trial court held that the Paternity Act was constitutional, and having ruled on the constitutionality of the Act and the other points raised in the motion, the motion was denied. R.C66.

A notice of appeal was filed on November 1, 1968. R.C68.

From the various void orders denying the motions heretofore set forth, the defendant appealed to the Supreme Court of Illinois.

The appeal was dismissed on January 21, 1970, and a rehearing was denied on March 23, 1970.

Reasons for Granting the Writ.

1. The Paternity Act is unconstitutional.

The 14th Amendment to the Constitution of the United States, (U. S. Const. Amend. 14) in part, provides:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of Illinois (Ill. Const. 1870, Art. II, Sec. 2) has a similar provision. It provides:

> "No person shall be deprived of life, liberty or property without due process of law."

The Constitution of the State of Illinois (Ill. Const. 1870, Art. II, Sec. 12) also provides:

> "No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law; or in case where there is a strong presumption of fraud."

The Paternity Act, approved July 5, 1957, violates the 14th Amendment to the Constitution of the United States, and also Sections 2 and 12 of Article II of the Constitution of the State of Illinois.

The constitutionality of the Paternity Act was raised in the trial court. Naturally, the court ruled that it was constitutional and valid. The court having ruled upon the constitutionality of the Act and the other points raised, the motion was denied.

The provisions of the Act relating to the issuance of a warrant, arrest, bond, and imprisonment for neglect to

give bond and security appear only in a criminal prosecution. They have absolutely no place in a civil action.

First, the Act authorized the issuance of a warrant for the apprehension of the defendant, which warrant shall be directed to all sheriffs, coroners, and other police officers in the State.

Second, it provides that the warrant may be served by any such officer in any county. However, it does not require that the person arrested shall be taken without unnecessary delay before the judge who issued the warrant.

Third, the accused is then imprisoned in jail. He is denied bail until his appearance before the court for the examination of the woman. He is deprived of his liberty without due process of law.

Fourth, he is imprisoned for neglect to give bond and security. The bond is payable to the People of the State of Illinois, and not to the plaintiff in the action. A refusal to enter into the bond ordered by the court, or a wilful refusal to comply with the term of the order of child care and support and the confinement expenses of the mother may be adjudged a contempt of court and punished accordingly.

Fifth, it authorizes a proceeding for contempt of court and imprisonment for such contempt.

In Illinois, it is well settled that a paternity proceeding is a civil action, and not a criminal prosecution, and is purely statutory, but the action which is authorized by the Act clearly violates the constitutional rights of the accused. Such provisions violate both the Federal and State constitutions. They deprive the defendant of his liberty and property without due process of law.

The word, debt, in the Constitution of the State of Illinois can not be construed to include damages for torts or fines or penalties arising from a violation of the penal laws of the state. The entire section clearly indicates that reference was had to debts arising ex contractu, express or implied. As heretofore stated, it provides that no person shall be imprisoned for debt. As to the debts intended to be embraced, there must be relation of debtor and creditor. Such relation exists between the reputed father of a child born out of wedlock and the mother. She seeks to establish the paternity of a child born out of wedlock and to establish and enforce liability for its support, maintenance, education and welfare. It has been repeatedly held by this court that any liability to pay money arising out of a contract, express or implied, constitutes a debt within the meaning of the Constitution. The liability of the father of a child born out of wedlock for its support, maintenance, education and welfare, and for the reasonable expenses of the mother during the period of her pregnancy, confinement and recovery arises out of an implied contract with her to support the child. The amount of support and confinement expenses constitute a debt, and the Constitution declares that no person shall be imprisoned for debt. A statute which authorizes imprisonment of an accused in such cases is in conflict with the provision of the Constitution which abolished imprisonment for debt.

These vicious provisions first appeared in the Paternity Act which was approved on July 5, 1957. Although they remain unchanged, they have absolutely no place in a civil action.

The constitutional guaranty of due process of law does not require that parties shall be entitled to any

particular form of action or method of procedure for the protection of rights and the redress of wrongs. It does, however, require that the substance of property rights be preserved, that the courts accord the parties due process in determining adjective and substantive law, and that some adequate and appropriate remedy be afforded for the vindication of personal and property rights. It also required that such remedy shall be by a regular and orderly mode of procedure by due course of law, that relief be afforded in a court of complete jurisdiction, and that the defendant shall have notice, and an opportunity to be heard in his defense. Such essentials constitute the basic requisites of due process of law.

No particular form of process or notice is necessary to constitute due process of law. It does not, however, authorize the issuance of a warrant and the arrest of the accused in a civil action.

This is the only civil action which authorizes the issuance of a warrant, the arrest of the accused, and his imprisonment until the examination of the complainant in his presence. The trial court may then bind the accused person, in bond with sufficient security, to appear in court to answer the charge. In neglect or refusal to give bond and security, the court shall commit the accused to the county jail, there to be held to answer the complaint.

Little more than bare assertions of the issues sought to be raised are required. The viciousness of the provisions are indeed apparent. They violate the 14th Amendment to the Constitution of the United States, and also Section 2 of Article II of the Constitution of the State of Illinois.

This is a case of first impression. More than twelve years have elapsed since the Paternity Act was approved. The court below has not passed upon the constitutionality of the Act.

The Paternity Act is repugnant to both Constitutions. Clearly, it is void. It is indeed time that the court should consider the same. It must be so declared by the court.

There was a flagrant denial of due process of law under both Constitutions.

2. The provisions of the Paternity Act relating to the issuance of a warrant, arrest, bond, imprisonment for neglect to give bond and security, contempt of court and imprisonment for contempt are void.

The Constitution of the State of Illinois (Ill. Const. 1870, Art. IV, Sec. 13), in part, provides:

> "* * * No act hereafter passed shall embrace more than one subject and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title; such act shall be void only as to so much thereof as shall not be so expressed; and no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act. * * *"

The title of the Paternity Act (Ill. Rev. Stat. 1961, Ch. 106¾, Sec. 51) is, as follows:

> "An Act in relation to the paternity of children born out of wedlock, to provide for the liability of the parents of such children, and to repeal an Act herein named."

In *People ex rel. Adams* v. *Sanes*, 41 Ill. 2d 381, 383, 242 N.E. 2d 233, certiorari denied 395 U.S. 910, 89 S. Ct. 1752, 23 L. ed. 2d 223, the court said:

"'To render a provision in the body of a statute void as not embraced in the title, the provision must be one which is incongruous, or which has no proper connection with the title.' (*People ex rel. Gutknecht v. City of Chicago*, 414 Ill. 600, 608, 111 N.E. 2d 626, 632.) 'The constitution is obeyed if all the provisions relate to one subject, or incident to it, or reasonably connected with it, or in some reasonable sense auxiliary to the object in view.' (*Memorial Gardens Ass'n v. Smith*, 16 Ill. 2d 116, 129, 156 N.E. 2d 587, 596.) In our judgment, there is sufficient connection and harmony between the title and provision in question here (which is not in question in the instant case) to satisfy the constitutional mandate. See *Pasfield v. Donovan*, 7 Ill. 2d 563, 569-570, 131 N.E. 2d 504."

It is clear that there is absolutely no connection or harmony between the title and the provisions in question here. Such provisions violate both the Federal and State constitutions. They have no place in a civil action. They are void. Justice demands that they be so declared by the court.

Again, there was a denial of due process of law.

3. The entire proceedings are void.

In the opinion, the court below said:

"For the purposes of this opinion, it may be said that the litigation had its origin on March 27, 1962, when plaintiff filed an amended complaint alleging that defendant was the father of a child born to her out of wedlock on January 17, 1962, and praying that he be ordered to pay support for the child and the expenses incurred as a result of the pregnancy. Also filed was an acknowledgment of paternity signed by defendant, upon whom a capias had been served.

> An order entered the same date manifested a finding that defendant was the father of the child and found him liable for support and expenses. Apparently due to the circumstance that defendant was unemployed, determination of the amount of support and expenses was reserved, but the defendant signed an enforcement bond in the amount of $1,000 as contemplated by section 10 of the Paternity Act. (Ill. Rev. Stat. 1961, ch. 106¾, par. 60.) Subsequently, a hearing was held February 25, 1963, which culminated with an order finding that defendant had obtained employment and directing him to pay doctor and hospital bills and support of $15 per week. Defendant was given notice, but did not appear."

Contrary to the opinion, it may not be said that the litigation had its origin on March 27, 1962. It was wrong for the court to so state because it is absolutely against the record.

The original complaint was filed on February 3, 1962. It recites, among other things, that "the said plaintiff is now pregnant with a child in the County of Winnebago, State of Illinois, which, if born alive, may be deemed by law 'a child born out of wedlock' and that the said child was fathered by the Defendant, James Joiner, a resident of or who may be found in the County of Winnebago, State of Illinois." It was verified, but it appears that the oath meant little to the plaintiff. Who can possibly believe a woman who swore that she was pregnant when in fact the child had been delivered?

It was ordered by the court on the same day that the Sheriff be and he was authorized to take into custody and bring the defendant before the court forthwith. The original complaint was so insufficient that it did not

authorize the court to issue a warrant. The warrant is void.

Although the Act authorized the court to issue a warrant for the apprehension of the defendant, the court did not actually authorize a warrant to issue. The clerk, however, issued a warrant. It was served by arresting the defendant on March 26, 1962. Clearly, the issuance of the warrant was void. The arrest of the defendant was unauthorized. It was illegal.

This is a civil proceeding. It is archaic to believe that a statute may authorize a warrant to be issued against a defendant in a civil action. Who can possibly believe that such a statute is valid?

An amended complaint was filed on March 27, 1962. It recites, among other things, that "the said plaintiff was delivered in the County of Winnebago, State of Illinois, of a male child, James Curtis Deckard, born January 17, 1962, which would be deemed by law 'a child born out of wedlock' and that the child was fathered by the defendant, James Joiner, a resident of or who may be found in the County of Winnebago, State of Illinois."

In the prayer for relief the plaintiff prays that "the said plaintiff be appointed guardian of said child and be awarded the care, custody and control of said child," and "that the said defendant be ordered and decreed to pay sufficient sums of money for the plaintiff's expenses incurred by her pregnancy, confinement and recovery and the said child's support, maintenance, education and welfare."

It was verified.

The Paternity Act provides that the provisions of the Civil Practice Act * * *, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder except as otherwise specifically provided in the Act. (Ill. Rev. Stat. 1961, Chap. 106¾, Sec. 64.)

If a proceeding is instituted before the birth of the child, it is necessary that the plaintiff file an amended or supplemental complaint. Leave should be obtained from the trial court to file the same before trial. (*People ex rel. Barrett* v. *Anders*, 173 Ill. App. 561.)

Here, an amended complaint was filed, but leave was not obtained by the plaintiff. As heretofore shown, it recites that "the said plaintiff was delivered * * * of a male child, James Curtis Deckard, born January 17, 1962." In addition to the delivery of the child, it should have alleged:

1. The child is living. (Ill. Rev. Stat., 1961, Chap. 106¾, Sec. 63.)

2. That the defendant is the father of the child, and not that the child was fathered by the defendant. (Ill. Rev. Stat. 1961, Chap. 106¾, Sec. 59.) The pleader should have followed the complaint in *Di-Bella* v. *Cuccio*, 15 Ill. 2d 580.

3. That the parties were not married to each other at the time of its birth. (Ill. Rev. Stat. 1961, Chap. 106¾, Sec. 51.)

4. That the child was not legally adopted. (Ill. Rev. Stat. 1961, Chap. 106¾, Sec. 63.)

The purpose of a paternity proceeding is to establish the paternity of a child born out of wedlock and to establish and enforce liability for its support, maintenance, education and welfare. (Ill. Rev. Stat. 1961,

Chap. 106¾, Sec. 54.) A father whose paternity is so established shall also be liable for the reasonable expenses of the mother during the period of her pregnancy, confinement and recovery, which liability may be determined and enforced in the proceeding in which paternity is established or in any subsequent proceeding to enforce liability for the support, maintenance, education and welfare of the child. (Ill. Rev. Stat. 1961, Chap. 106¾, Sec. 53.)

Here, the original complaint and the amended complaint fail to contain a specific prayer to establish the paternity of the child. The Civil Practice Act provides that every complaint shall contain specific prayers for relief to which the pleader deems himself entitled. (Ill. Rev. Stat. 1961, Chap., 110, Sec. 34.) Except in case of default, the prayer for relief does not limit the relief obtainable. Here, the relief obtainable was limited because the defendant was in default.

The defendant was first brought before the trial court on March 27, 1962. (R.C12.) He was not given an opportunity to answer the complaint nor was he ruled to answer it. The trial court should have required him to file an answer or otherwise file his appearance, as provided by the Civil Practice Act and the rules. (Ill. Rev. Stat. 1961, Chap. 110, Sec. 32.)

Instead, it appears that someone requested the defendant to sign an acknowledgment of paternity. In it he purportedly acknowledged the paternity of the child, but it was not made under oath or affirmation, as provided by the Paternity Act. (Ill. Rev. Stat. 1961, Chap. 106¾, Sec. 54.)

Clearly, the Act contemplates that the acknowledgment of paternity of the child by a written statement is to precede the institution of the action. (*Brown* v. *Box,* 38 Ill. 2d 80.) Here, the record shows that the acknowledgment was filed subsequent to the original complaint and the amended complaint. The purported acknowledgment of paternity was not filed in apt time. The filing of the acknowledgment preceding the institution of the action is jurisdictional. (*Brown* v. *Box,* 38 Ill. 2d 80.) It is void.

Although a purported acknowledgment of paternity was filed, the trial court did not find that the defendant was the father or enter judgment to that effect. The court, however, had no power or authority to find that he was the father or enter judgment to that effect because the complaint failed to contain a specific prayer to establish the paternity of the child.

As heretofore shown, in the opinion, the court below said:

> "An order entered the same date manifested a finding that defendant was the father of the child and found him liable for support and expenses."

The word, manifested, means readily perceived by the eye or the understanding, evident, obvious, apparent, plain. However, the record fails to disclose any finding by the trial court that the defendant was the father of the child. In addition, the court did not enter judgment to that effect. Clearly, the court below had no right to consider a "manifestation" in its decision. It must be bound by the record and cannot go outside the same. Such departure from the record denied the defendant due process of law.

Section 5 of the Paternity Act (Ill. Rev. Stat. 1961, Chap. 106¾, Sec. 55), in part, provides:

> "* * * Upon the appearance of the accused and in his presence, the court shall examine the woman upon oath or affirmation, on the charge that he is the father of the child. The accused shall have the right to controvert the charge, and evidence may be heard as in other cases within the jurisdiction of the court. If the court is of the opinion that no sufficient cause is established it shall dismiss the complaint and discharge the accused. The accused shall have the right to submit to a blood test. If the accused so submits himself, the court shall order such test administered. If the blood test shows that the accused is not the father of the child as alleged in the complaint, the accused shall be discharged forthwith by the court. If the accused admits the charge, or waives examination of the complainant, or if after the accused has controverted the charge, the court, upon examination, determines that sufficient cause appears, it shall bind the accused person, in bond, with sufficient security, to appear in court on a designated return day occurring within 30 days from the date of the bond, or as soon thereafter as the court is in session, and from day to day after the time so designated until the final order or judgment of the court, to answer the charge and abide the final order or judgment and not to depart without leave, to which court the bond shall be returned. In neglect or refusal to give bond and security, the court shall commit the accused to the county jail, there to be held to answer the complaint. * * *"

The record discloses that the trial court failed to follow the practice and procedure set forth in the Act.

First, the defendant was first brought before the trial court on March 27, 1962, but upon his appearance the

court did not examine the woman, upon oath or affirmation, on the charge that he was the father of the child.

Second, the accused did not have an opportunity to controvert the charge, nor was he advised of his right to do so.

Third, he did not have an opportunity to submit to a blood test, nor was he advised of his right to do so.

Fourth, he was not advised relative to an acknowledgment of paternity and the effect thereof.

Fifth, evidence was not heard by the the trial court.

Sixth, the trial court did not bind the accused person, in bond, with sufficient security, to appear in court on a designated return day occurring within 30 days from the date of the bond, or as soon thereafter as the court is in session, and from day to day after the time so designated, until the final order or judgment of the court, to answer the charge and to abide the final order or judgment and not to depart without leave, to which court the bond shall be returned.

The practice and procedure was not in accordance with the provisions of the Act. Clearly, the entire proceedings are void.

As heretofore shown, in the opinion, the court below said:

> "Subsequently, a hearing was held February 25, 1963, which culminated with an order finding that defendant had obtained employment and directing him to pay doctor and hospital bills and support of $15 a week. Defendant was given notice, but did not appear."

Contrary to the opinion, the record fails to disclose that a hearing was held on February 25, 1963, or set forth the purported notice that was given to the defendant.

The last order was entered on March 27, 1962. If new or additional relief is sought, as in this case, the defendant is entitled to personal service of notice. Surely, service is not complete until the notice is received. The requirements of fairness and due process must be met. Clearly, the trial court did not have jurisdiction to conduct a hearing or enter any order. The purported order is void.

Section 9 of the Paternity Act (Ill. Rev. Stat. 1961, Chap. $106\frac{3}{4}$, Sec. 59), in part, provides:

> "If the defendant has acknowledged that he is the father of the child, either at the preliminnary hearing provided in Section 5 or at the subsequent trial of the issue, which acknowledgment he has not repudiated at the trial of the issue, or if on the trial of the issue the court or jury, as the case may be, finds that he is the father, the court shall enter judgment to that effect. If such judgment is entered the court shall take evidence upon the requirement of the child for its support, maintenance, education and welfare, and upon the expenses of the mother during pregnancy, confinement and recovery, and shall enter an order thereof. The order may be directed to the father, or mother, or both. The court shall retain jurisdiction of the cause and may, upon proper written notice of the hearing to the parties in interest, make new or supplementary orders for the support, maintenance, education and welfare of the child as from time to time the court deems necessary, upon petition of the mother, the father, any interested person who has contributed

to the support, maintenance, education and welfare, or any governmental agency interested in the support, maintenance, education and welfare of the child. * * *"

Prior to any preliminary hearing or any trial of the issue, the defendant repudiated the purported acknowledgment of paternity on December 1, 1967. (R. C51.) In a motion filed on the same day, he moved to vacate the purported acknowledgment of paternity filed on March 27, 1962, because he had repudiated the same. The motion was denied. The repudiation of the purported acknowledgment of paternity and the motion to vacate were in apt time.

Objection was made to the original complaint and the amended complaint in the trial court. If a complaint fails to state a cause of action, or to contain a specific prayer for relief, as in this case, it is not cured by verdict or judgment. Clearly, both complaints are fatally defective. They fail to state the facts necessary to a cause of action. Likewise, they fail to contain a specific prayer for relief to establish the paternity of the child. This is absolutely necessary in a paternity proceeding. The entire proceedings are void.

It is reversible error.

Again, there was a denial of due process of law.

4. The petitioner was deprived of his constitutional right to a fair trial.

He was first brought before the trial court on March 27, 1962, but upon his appearance the court did not examine the woman, upon oath or affirmation, on the charge that he was the father of the child. (Ill. Rev. Stat. 1961,

Chap. 106¾, Sec. 55.) He did not have an opportunity to controvert the charge, nor was he advised of his right to do so. He did not have an opportunity to submit to a blood test, nor was he advised of his right to do so. Evidence was not heard by the court. The court did not bind the accused person, in bond, with sufficient security, to appear in court on a designated return day occurring within 30 days from the date of the bond, or as soon thereafter as the court is in session, and from day to day after the time so designated, until the final order or judgment of the court, to answer the charge and to abide the final order or judgment and not to depart without leave, to which court the bond shall be returned.

There was a substantial denial of his constitutional rights under the Federal and State constitutions.

He was not warned of his absolute right to remain silent. He was not warned that anything that he said would and could be used against him in court. He was not advised of his right to the assistance of counsel. He was not advised that if he is not able to employ counsel, the court will appoint counsel for him. He did not understandingly waive his right to counsel. He was deprived of his right to counsel.

He did not understand the nature and cause of the accusation against him. He was in ignorance of his rights and of the consequences of his acts.

He did not understandingly waive examination of the woman or his right to controvert the charge. He did not understandingly waive his right to a blood test.

He was not furnished with a copy of the amended complaint nor was it read to him.

The case was not at issue. He had a right to file an answer to the amended complaint. He was not ruled to answer the complaint. There was no entry of an order of default. The trial court had no right to proceed.

He was not advised of his right to a trial by jury. He did not understandingly waive his right to a trial by jury.

He was not advised relative to an acknowledgment of paternity and the effect thereof.

If on the trial of the issue the court or jury, as the case may be, finds that the defendant is the father, the court shall enter judgment to that effect. (Ill. Rev. Stat. 1961, Chap. 106¾, Sec. 59.) The statute is mandatory. The trial court must enter judgment. As shown in *DiBella* v. *Cuccio,* 15 Ill. 2d 580, 582, and in *People ex rel Adams* v. *Sanes,* 41 Ill. 2d 381, 382, the trial court entered judgment finding the defendant to be the father of the child. It acted in compliance with the statute, as the court should have done in this case, providing that the complaint contained a specific prayer for relief to establish the paternity of the child. Here, the judgment was not entered.

Section 9 of the Paternity Act (Ill. Rev. Stat. 1961, Chap. 106¾, Sec. 59), in part, provides:

> "* * * If such judgment is entered the court shall take evidence upon the requirements of the child for its support, maintenance, education and welfare, and upon the expenses of the mother during pregnancy, confinement and recovery, and shall enter an order thereof. * * *

> In determining the amount of support and confinement expenses to be charged to the father, the court shall take into account not only his financial condition and circumstances but also the income and resources of the mother which are or may be available for the support of the child. * * *"

The statute requires, as a basis for an order of support, a judgment that the defendant is the father of the child. (*Mowery* v. *Karas*, 35 Ill. App. 2d 406, 183 N.E. 2d 35.)

As heretofore shown, the record discloses that judgment was not entered. If judgment is not entered, the trial court does not have any power or authority to take such evidence and enter an order thereof. Here, the trial court did not take any evidence upon the requirements of the child for its support, maintenance, education and welfare, or upon the expenses of the mother during pregnancy, confinement and recovery. The trial court should have followed the provisions of the statute relative thereto, but it failed to do so. The want of evidence is fatal to the order of support, as well as the order for contempt. The orders are void.

The principles of the fundamental fairness of the proceeding have been flagrantly violated. See *Brown* v. *Box*, 38 Ill. 2d 80. The defendant was also deprived of his constitutional right to the assistance of counsel.

The totality of circumstances are so wanting in fairness as to deprive the defendant of due process of law.

It is reversible error.

Again, there was a denial of due process of law.

5. The court did not enter judgment that the petitioner is the father of the child.

The statute is mandatory. (Ill. Rev. Stat. 1961, Chap. 106¾, Sec. 59.) The trial court must enter judgment.

As shown in *DiBella* v. *Cuccio*, 15 Ill. 2d 580, 582, the trial court entered judgment "finding the defendant to be the father of the child." It acted in compliance with the statute, as the court should have done in this case.

Here, the judgment was not entered. The trial court failed to comply with the statute.

In the motion to vacate, it was pointed out to the trial court that it had not entered judgment. (R.C36, R.C61.) The court had an opportunity to amend the record, but it did not do so. The failure to enter judgment is not the fault of the defendant.

It is reversible error.

Again, there was a denial of due process of law.

6. The court was without jurisdiction to enter the order of support, or the order of contempt.

Section 9 of the Paternity Act (Ill. Rev. Stat. 1961, Chap. 106¾, Sec. 59), in part, provides:

> "* * * If such judgment is entered the court shall take evidence upon the requirements of the child for its support, maintenance, education and welfare, and upon the expenses of the mother during pregnancy, confinement and recovery, and shall enter an order thereof. * * *
>
> In determining the amount of support and confinement expenses to be charged to the father, the court shall take into account not only his financial condition and circumstances but also the income and

resources of the mother which are or may be available for the support of the child. * * *"

The statute requires, as a basis for an order of support, a judgment that the defendant is the father of the child. (*Mowery* v. *Karas,* 35 Ill. App. 2d 406, 183 N.E. 2d 35.)

As heretofore shown, the record discloses that judgment was not entered. If judgment is not entered, the trial court does not have any power or authority to take such evidence and enter an order.

Here, the trial court did not take evidence upon the requirements of the child for its support, maintenance, education and welfare, or upon the expenses of the mother during pregnancy, confinement and recovery.

The trial court should have followed the provisions of the statute relative thereto, but it failed to do so. The want of evidence is fatal to the order of support, as well as the order of contempt. The orders are void.

It is reversible error.

Again, there was a denial of due process of law.

7. It is the duty of the State's Attorney upon request of the woman, to file the complaint on her behalf and proceed forthwith in the enforcement of the Act.

The State's Attorney, who had instituted the paternity proceeding, is the proper person to represent the plaintiff. It is his duty to enforce the order of support.

David L. Martenson, who filed the petition for rule to show cause, was without authority to represent the plaintiff. The State's Attorney had not withdrawn from

the proceeding, nor had Mr. Martenson been given leave to enter his appearance.

The petition was not filed in apt time. The plaintiff is guilty of laches. She is estopped from recovery from the defendant.

The petition is fatally defective. It does not state a cause of action. It is not based upon a valid judgment that the defendant is the father of the child. It is not verified.

The petition should have been dismissed.

It is reversible error.

Again, there was a denial of due process of law.

8. The judgment in favor of the plaintiff and against the defendant for $3,090.00 is void.

This case involves the procedure that must be followed before a trial court may render judgment against a defendant for an amount due for child support and the confinement expenses of the mother.

The procedure is set forth in Section 10 of the Paternity Act. (Ill. Rev. Stat. 1967, Chap. 106¾, Sec. 60.) It is, as follows:

> "Section 60. Bond of defendant—Enforcement.) Section 10. In any order entered pursuant to Section 9 providing for the care and support of a child and the confinement expenses of the mother, the court shall require the defendant to enter into a bond with at least one good and sufficient surety to be approved by the court, or without sureties if none can be obtained, in such amount as the court shall determine, conditioned upon compliance with the terms of the order pertaining to child care and support and the confinement expenses of the mother.

The court may from time to time require the execution of new bonds as may be necessary to assure compliance with the order of child care and support and of the confinement expenses of the mother, or any modification thereof, or to make necessary adjustments occasioned by changed circumstances of the parties.

The bond shall be payable to the People of the State of Illinois and shall be filed with and preserved by the clerk of the court. A refusal to enter into the bond ordered by the court, or a wilful refusal to comply with the terms of the order of child care and support and of the confinement expenses of the mother may be adjudged a contempt of the court and punished accordingly, but no child care or support and confinement expenses of the mother shall accrue during the period in which a party is imprisoned for such contempt.

Whenever default occurs in the payment of any amount due for child care and support and the confinement expenses of the mother, the State's Attorney, or the Attorney General if the action has been instituted by his office, upon request of any person or governmental agency having an interest in the support of the child shall, or upon his own initiative may, institute a proceeding in the court in which the bond is filed for the issuance of a citation to the principal and sureties, if any, on the bond. The court shall issue the citation requiring the principal and sureties to appear on the date designated therein, to show cause why execution should not issue against them for the amount in default. The citation shall be served upon the principal and sureties as in the case of other civil process. If the amount due has not been paid on or prior to the date of showing cause, the court shall render judgment in favor of the People of the State of Illinois, against the principal and sureties

who have been served with the citation for the amount unpaid and the costs of the proceeding; and execution shall issue thereon as in the case of judgments in other civil actions against the property of such principal and sureties to the sheriff of any county where they or any of them reside or have property subject to such execution. The proceeds of any sale upon execution, after deduction and payment to the county treasurer of the costs incurred by the County, shall be paid to the Clerk of the Court or Court Service Division of the Cook County Department of Public Aid, as provided in Section 10.1.

The rendition and collection of judgment, as aforesaid, shall not discharge the principal and sureties in the bond in respect to future liability for child support and confinement expenses of the mother and shall not be a bar to the taking of similar proceedings for the collection of child support and confinement expenses of the mother becoming due and remaining payable. As amended by act approved July 8, 1965. L. 1965, p. 1329."

If default is made in the payment of child support and the confinement expenses of the mother, the State's Attorney may, upon request or his own initiative, institute a proceeding for the issuance of a citation to the principal and sureties, if any, on the bond. (Ill. Rev. Stat. 1967, Chap. 106¾, Sec. 60.) The court shall issue the citation requiring the principal and sureties to appear on the date designated therein, to show cause why execution should not issue against them for the amount of the default. The citation shall be served upon them as in the case of other civil process. If the amount due has not been paid on or prior to the date for showing cause, the court shall render judgment in favor of the People of the State of Illinois against the principal and sureties who have been served with the citation for the

amount unpaid and the costs of the proceeding and execution shall issue thereon.

Here, the State's Attorney did not institute a proceeding for the issuance of a citation. No citation was issued, nor was any served upon the defendant.

It is clear that the trial court did not have jurisdiction of the subject matter of the proceeding filed by David L. Martenson who was employed by the plaintiff, or of the person of the defendant. (R.C31.) The court did not have the power or authority to render judgment in favor of the plaintiff and against the defendant for any sum. It was only authorized to render judgment in favor of the People of the State of Illinois, but it failed to do so. The purported judgment is void.

It is reversible error.

Again, there was a denial of due process.

9. **The appeal was taken in apt time.**

Notice of appeal was filed with the clerk of the trial court within 30 days after the entry of the final judgment. (R.C68.)

The appeal was taken from all orders entered from March 24, 1962, to and including the order entered October 4, 1968, denying the motion to vacate and set aside all proceedings herein, together with the various purported orders and judgments, and to dismiss the petitions for citation for contempt and for rule to show cause, the amended complaint, the original complaint, and the action brought on February 3, 1962.

The entire proceedings are void.

Section 72 of the Civil Practice Act is not applicable. (Ill. Rev. Stat. 1967, Chap. 110, Sec. 72.) Subsection (7) states that nothing in the section affects any existing right to relief from a void order, judgment or decree, or to employ any existing method to procure that relief. In addition, it is stated in the Joint Committee Comments that this subsection makes clear that the right to secure relief from a void order, judgment or decree at any time and by any appropriate method has not been affected by this section.

A void judgment is a judgment where there is a want of jurisdiction of the subject matter of the action, or of the person of the defendant. It may be attacked at any time and in any court. (*Fennema* v. *Vander Aa*, 93 Ill. App. 2d 162, 236 N.E. 2d 409, *Szymanowski* v. *Kellogg*, 64 Ill. App. 2d 126, 212 N.E. 2d 316, *Wienhoeber* v. *Wienhoeber*, 53 Ill. App. 2d 387, 202 N.E. 2d 864.)

Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay. (Ill. Const. 1870, Art. II, Sec. 19.)

Clearly, the court below had jurisdiction to review the appeal and should have done so.

Conclusion.

This case involves the constitutionality of the Paternity Act as well as other important questions relative to the practice and procedure set forth in the Act.

The practice and procedure is the most defective that appears in the decisions in Illinois. There is not a single case which supports the decision of the court below. It sets a bad precedent.

There has been a substantial denial of the constitutional rights of the petitioner. The accused did not have a fair trial. It is the greatest human right that an accused has. Illinois has deprived him of his liberty and property without due process of law in violation of the Constitutions of the United States and the State of Illinois. It has also denied him the equal protection of the laws.

In order that justice may be done, this court should take jurisdiction. It is the last hope of the petitioner.

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN R. SNIVELY,
Counsel for Petitioner.

APPENDIX

A.

Constitutions

Constitution of the United States

Articles in Addition to, and Amendment of, the Constitution.

Amendment XIV

Section 1. * * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Illinois

Adopted in Convention at Springfield, May 13, 1870. Ratified by the People, July 2, 1870. In force August 8, 1870.

Article II
Bill of Rights

Section 2. No person shall be deprived of life, liberty or property, without due process of law.

Section 12. No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law; or in case where there is a strong presumption of fraud.

Section 19. Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay.

Article IV
Legislative Department

Section 13. * * * No act hereafter passed shall embrace more than one subject and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title; such act shall be void only as to so much thereof as shall not be so expressed; and no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act. * * *

B.

Statute

An Act in relation to the paternity of children born out of wedlock, to provide for the liability of the parents of such children, and to repeal an Act herein named. Approved July 5, 1957. L. 1957, p. 1035.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

51. Definitions.) Section 1. For the purposes of this Act a "child born out of wedlock" is a child whose parents were not married to each other at the time of its birth; provided that a child shall not be considered as born out of wedlock if its parents were married at the

time of its conception but divorced at the time of its birth, or if after the conception or birth of the child, the marriage of its parents is declared void for any reason. The definition of legitimacy or illegitimacy for other purposes shall not be affected.

52. Liability of father and mother to child.) Section 2. The father of a child born out of wedlock whose paternity is established in a proceeding under this Act shall be liable for its support, maintenance, education and welfare, until the child's attainment of age 18 or until the child is legally adopted, to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for its support, maintenance, education and welfare.

The mother of a child born out of wedlock shall also be liable for its support, maintenance, education and welfare to the same extent as if the child had been born in lawful wedlock. As amended by act approved Aug. 21, 1961. L. 1961, p. ....., S.B. No. 20.

53. Liability of father for maternity expenses.) Section 3. A father whose paternity is so established shall also be liable for the reasonable expenses of the mother during the period of her pregnancy, confinement and recovery, which liability may be determined and enforced in the proceeding in which paternity is established or in any subsequent proceeding to enforce liability for the support, maintenance, education and welfare of the child.

54. Institution of the action.) Section 4. A proceeding to establish the paternity of a child born out of wed-

lock and to establish and enforce liability for its support, maintenance, education and welfare may be instituted in a court having jurisdiction of cases coming within the terms of "An Act relating to children who are or may hereafter become dependent, neglected or delinquent, to define these terms, and to provide for the treatment, control, maintenance, adoption and guardianship of the persons of such children, and to give to the courts having jurisdiction of cases coming within this Act, jurisdiction to proceed with the prosecution and punishment of persons contributing to the dependency, neglect or delinquency of children", approved April 21, 1899, as amended. All other courts of record having jurisdiction of actions to establish the paternity of children born out of wedlock may also hear and determine such proceedings in the manner provided by this Act.

Such action may be instituted only on the filing of a complaint in writing by the mother of a child born out of wedlock, or by a woman who is pregnant with child, which, if born alive, may be born out of wedlock, accusing, under oath or affirmation, a person with being the father of such child. The several State's Attorneys within their respective counties shall, upon the request of such woman, file the complaint on her behalf and proceed forthwith in the enforcement of this Act. The action may be filed in the county where the complainant may be so pregnant or delivered, or where the person accused may reside or be found. No such action may be brought after the expiration of 2 years from the birth of the child; provided, that where the person accused has acknowledged in open court the paternity of the child, prosecution may be brought at any time within 2 years from the last time such acknowledgment was made; and,

provided further, that the time any person so accused is absent from the State shall not be computed. As amended by act approved Aug. 21, 1961. L. 1961; p. ....., S.B. No. 19.

54. Institution of the action.) Section 4. A proceeding to establish the paternity of a child born out of wedlock and to establish and enforce liability for its support, maintenance, education and welfare may be instituted in a court having jurisdiction of cases coming within the terms of "An Act relating to children who are or may hereafter become dependent, neglected or delinquent, to define these terms, and to provide for the treatment, control, maintenance, adoption and guardianship of the persons of such children, and to give to the courts having jurisdiction of cases coming within this Act, jurisdiction to proceed with the prosecution and punishment of persons contributing to the dependency, neglect or delinquency of children", approved April 21, 1899, as amended. All other courts of record having jurisdiction of actions to establish the paternity of children born out of wedlock may also hear and determine such proceedings in the manner provided by this Act.

Such action may be instituted only on the filing of a complaint in writing by the mother of a child born out of wedlock, or by a woman who is pregnant with child, which, if born alive, may be born out of wedlock, accusing, under oath or affirmation, a person with being the father of such child. The action may be filed in the county where the complainant may be so pregnant or delivered, or where the person accused may reside or be found. No such action may be brought after the expiration of 2 years from the birth of the child; provided, that where the person accused has acknowledged the pa-

ternity of the child by a written statement made under oath or affirmation or has acknowledged the paternity of such child in open court, prosecution may be brought at any time within 2 years from the last time such acknowledgment was made or within 2 years from the last time the person accused contributed to the support, maintenance, education and welfare of the child subsequent to such acknowledgment; and, provided further, that the time any person so accused is absent from the State shall not be computed. As amended by act approved Aug. 21, 1961. L. 1961, p. ....., S.B. No. 20.

55. Arrest-Examination-Bond.) Section 5. Upon the filing of a complaint as provided in Section 4, under oath or affirmation before the Court, the Court shall thereupon issue a warrant for the apprehension of the defendant, which warrant shall be directed to all sheriffs, coroners, constables and other police officers in the State, and which may be served by any such officer in any county. Upon the appearance of the accused and in his presence, the Court shall examine the woman, upon oath or affirmation, on the charge that he is the father of the child. The accused shall have the right to controvert the charge, and evidence may be heard as in other cases within the jurisdiction of the Court. If the accused so submits himself, the court shall order such test administered. If the blood test shows that the accused is not the father of the child as alleged in the complaint, the accused shall be discharged forthwith by the court. If the accused admits the charge, or waives examination of the complainant, or if after the accused has controverted the charge the court, upon examination, determines that sufficient cause appears, it shall bind the accused person, in bond, with sufficient security, to appear

in court on a designated return day occurring within 30 days from the date of the bond, or as soon thereafter as the court is in session, and from day to day after the time so designated, until the final order or judgment of the court, to answer the charge and to abide the final order or judgment and not to depart without leave, to which court the bond shall be returned. In neglect or refusal to give bond and security, the court shall commit the accused to the county jail, there to be held to answer the complaint. This Amendatory Act of 1959 shall not affect in any way actions commenced prior to the effective date of this Act. As amended by act approved July 15, 1959. L. 1959, p. 1045.

56. Trial by jury—Mother and accused to be competent witnesses.) Section 6. At the time appointed for appearance and answer, the court shall cause an issue to be made up whether the person charged is the father of the child, which issue, upon demand of either the mother or the accused person, shall be tried by a jury. In the trial of issue, the mother and the defendant shall be competent witnesses and their credibility shall be left to the court or jury as the case may be.

57. Inability of woman to attend trial—Continuance—Bond.) Section 7. If at the time appointed for appearance and answer the woman be not delivered, or is unable to attend, the court shall continue the cause for such time as appears necessary, and shall order a bond, in such amount and with such sureties as the court may deem just, for the appearance of the defendant at the day to which the cause is continued, which bond shall be further conditioned in the same manner as the bond provided for in Section 5. On neglect or refusal to give the bond and security, the defendant shall be committed to

the county jail, there to be held for the trial of the cause. If the mother has not been delivered or is unable to attend at the day to which the cause is continued, the court shall order further continuances as may be required from time to time and shall on each occasion continue the bond.

58. Discharge of defendant—Mother to pay costs.) Section 8. If upon the trial of the issue of paternity, the court or jury, as the case may be, finds that the defendant is not the father of the child, the judgment of the court shall be that the defendant be discharged. The mother shall pay the costs of the prosecution and judgment shall be entered therefore upon which execution may issue.

59. Judgment—Retention of jurisdiction—Determination of amount of support—Death of father.) Section 9. If the defendant has acknowledged that he is the father of the child, either at the preliminary hearing provided in Section 5 or at the subsequent trial of the issue, which acknowledgement he has not repudiated at the trial of the issue, or if on the trial of the issue the court or jury as the case may be, finds that he is the father, the court shall enter judgment to that effect. If such judgment is entered the court shall take evidence upon the requirements of the child for its support, maintenance, education and welfare, and upon the expenses of the mother during pregnancy, confinement and recovery, and shall enter an order with respect thereto. The order may be directed to the father or mother, or both. The court shall retain jurisdiction of the cause and may, upon proper prior written notice of the hearing to the parties in interest, make new or supplementary orders for the support, maintenance, education and welfare of the child

as from time to time the court deems necessary, upon petition of the mother, the father, any interested person who has contributed to the support, maintenance, education and welfare of the child or assumed its support, maintenance, education, and welfare, of the child, or any governmental agency interested in the support, maintenance, education and welfare of the child. Pending the initial determination of the support order, the court may make provision for bond and security to assure jurisdiction over the person of the defendant, and for the enforcement thereof by commitment of the defendant, in the manner provided in either Section 5 or 7 of this Act.

In determining the amount of support and confinement expenses to be charged to the father, the court shall take into account not only his financial condition and circumstances but also the income and resources of the mother which are or may be available for the support of the child. The court shall direct payment of the support to the mother, or to a person or agency designated by the court, as the welfare of the child requires.

Where the father of such child shall die after the adjudication that he is the father of the child and the entry of an order for support and confinement expenses, such unpaid amounts as to support and confinement expenses as shall have accrued at the date of the death of the father shall be a provable claim against his estate. As amended by act approved Aug. 21, 1961. L. 1961, p. ....., S.B. No. 20.

59. Judgment—Retention of jurisdiction—Determination of amount of support—Death of father.) Section 9. If the defendant has in writing acknowledged that he is

the father of the child, either at the preliminary hearing provided in Section 5, or at the subsequent trial of the issue, which acknowledgment he has not repudiated at trial of the issue, or if on the trial of the issue the court or jury, as the case may be, finds that he is the father, the court shall enter judgment to that effect. If such judgment is entered the court shall take evidence upon the requirements of the child for its support, maintenance, education and welfare, and upon the expenses of the mother during pregnancy, confinement and recovery, and shall enter an order thereof. The order may be directed to the father, or mother, or both. The court shall retain jurisdiction of the cause and may, upon proper prior written notice of the hearing to the parties in interest, make new or supplementary orders for the support, maintenance, education and welfare of the child as from time to time the court deems necessary, upon petition of the mother, the father, any interested person who has contributed to the support, maintenance, education and welfare of the child or assumed its support, maintenance, education, and welfare, or any governmental agency interested in the support, maintenance, education and welfare of the child. Pending the initial determination of the support order, the court may make provision for bond and security to assure jurisdiction over the person of the defendant, and for the enforcement thereof by commitment of the defendant, in the manner provided in either Section 5 or 7 of this Act.

In determining the amount of support and confinement expenses to be charged to the father, the court shall take into account not only his financial condition and circumstances but also the income and resources of the mother which are or may be available for the support of the child.

Where the father of such child shall die after the adjudication that he is the father of the child and the entry of an order for support and confinement expenses, such unpaid amounts as to support and confinement expenses as shall have accrued at the date of the death of the father shall be a provable claim against his estate. As amended by act approved Aug. 10, 1961. L. 1961, p. ....., H.B. No. 275.

60. Bond of defendant—Enforcement.) Section 10. In any order entered pursuant to Section 9 providing for the care and support of a child and the confinement expenses of the mother, the court shall require the defendant to enter into a bond with at least one good and sufficient surety to be approved by the court, or without sureties if none can be obtained, in such amount as the court shall determine, conditioned upon compliance with the terms of the order pertaining to child care and support and the confinement expenses of the mother.

The court may from time to time require the execution of new bonds as may be necessary to assure compliance with the order of child care and support and of the confinement expenses of the mother, or any modification thereof, or to make necessary adjustments occasioned by changed circumstances of the parties.

The bond shall be payable to the People of the State of Illinois and shall be filed with and preserved by the clerk of the court. A refusal to enter into the bond ordered by the court, or a willful refusal to comply with the terms of the order of child care and support and of the confinement expenses of the mother may be adjudged a contempt of the court and punished accordingly, but no child care or support and confinement ex-

penses of the mother shall accrue during the period in which a party is imprisoned for such contempt.

Whenever default occurs in the payment of any amount due for child care and support and the confinement expenses of the mother, the State's attorney, upon request of any person or governmental agency having an interest in the support of the child shall, or upon his own initiative may, institute a proceeding in the court in which the bond is filed for the issuance of a citation to the principal and sureties, if any, on the bond. The court shall issue the citation requiring the principal and sureties to appear on the date designated therein, to show cause why execution should not issue against them for the amount in default. The citation shall be served upon the principal and sureties as in the case of other civil process. If the amount due has not been paid on or prior to the date for showing cause, the court shall render judgment in favor of the People of the State of Illinois, against the principal and sureties who have been served with the citation for the amount unpaid and the costs of the proceeding; and execution shall issue thereon as in the case of judgments in other civil actions against the property of such principal and sureties to the sheriff of any county where they or any of them reside or have property subject to such execution. The proceeds of any sale upon execution, after deduction and payment to the county treasurer of the costs incurred by the county, shall be paid to the clerk of the court or Court Service Division of the Cook County Department of Public Aid, as provided in Section 10.1.

The rendition and collection of judgment, as aforesaid, shall not discharge the principal and sureties in the bond in respect to future liability for child support and

confinement expenses of the mother and shall not be a bar to the taking of similar proceedings for the collection of child support and confinement expenses of the mother becoming due and remaining payable. As amended by act approved Aug. 10, 1961. L. 1961, p. ....., H.B. No. 275 Section 1.

60.1. Support payments—Duties of person or agencies receiving or disbursing support moneys.) Section 10.1. (1) In an action filed on or after the effective date of this Amendatory Act of 1961 in counties of less than 500,000 population in which an order for child support is entered, and in supplementary proceedings in such counties to enforce or vary the terms of such order arising out of an action filed either prior to or on or after such effective date in such counties, the court shall direct that child support payments be made to the clerk of the court unless in the discretion of the court exceptional circumstances warrant otherwise. In cases where payment is to be made to persons other than the clerk of the court the decree or order of support shall set forth the facts of the exceptional circumstances.

(2) In an action filed on or after the effective date of this Amendatory Act of 1961 in counties of 500,000 or more population in which an order for child support is entered, and in supplementary proceedings in such counties to enforce or vary the terms of such order arising out of an action filed either prior to or on or after such effective date in such counties, the court shall direct that child support payments be made either to the clerk of the court or to the Court Service Division of the Cook County Department of Public Aid unless in the discretion of the court exceptional circumstances warrant otherwise. In cases where payment is to be

made to persons other than the clerk of the court or the Court Service Division of the Cook County Department of Public Aid the decree or order of support shall set forth the facts of the exceptional circumstances.

(3) All clerks of the court and the Court Service Division of the Cook County Department of Public Aid receiving child support payments shall disburse the same to the person or persons entitled thereto under the terms of the order. They shall establish and maintain current records of all moneys received and disbursed and of defaults and delinquencies in the required payments. The court, by order or rule, shall make provision for the carrying out of these duties.

(4) Orders for child support entered prior to the effective date of this Amendatory Act of 1961 shall not be affected thereby. The moneys received by persons or agencies designated by the court shall be disbursed by them in accordance with the order. However, the court, on petition of the state's attorney, may enter new orders designating the clerk of the court or the Court Service Division of the Cook County Department of Public Aid, as the person or agency authorized to receive and disburse child support payments. Payments of child support by principals or sureties on bonds, or proceeds of any sale upon execution, as provided in Section 10, shall, on and after the effective date of this Amendatory Act of 1961, be made to the clerk of the court or Court Service Division of the Cook County Department of Public Aid, as the case requires. Added by act approved Aug. 10, 1961. L, 1961, p. ....., H.B. No. 275.

61. Child to be deemed a "dependent child".) Section 11. Upon the filing of a complaint under this Act, the

child involved therein shall be deemed a "dependent child" within the meaning of Section 1 of "An Act relating to children who are or may hereafter become dependent, neglected or delinquent, to define these terms, and to provide for the treatment, control, maintenance, adoption and guardianship of the person of such children, and to give to the courts having jurisdiction of cases coming within this Act, jurisdiction to proceed with the prosecution and punishment of persons contributing to the dependency, neglect or delinquency of children", approved April 21, 1899, as amended.

The court may in such action to determine paternity and liability for support provide for the guardianship of such child in the mother or in any other person or institution as authorized by said Act.

62. Custody of child.) Section 12. A person charged or alleged to be the father of a child born out of wedlock, whether or not adjudicated the father under this Act, shall have no right to the custody or control of the child except such custody as may be granted pursuant to adoption proceeding initiated by him for that purpose.

63. Death of child—Bonds to become void.) Section 13. If the child involved in the complaint filed under this Act should not be born alive, or being born alive should thereafter die or be legally adopted, any bond executed hereunder shall become void; provided however, that if the child dies after an adjudication that the accused is the father and after an order is entered pursuant to Section 9, the liability of the father as to payments after the death shall cease but he shall remain liable for all sums accrued and unpaid at the death of the child and for the purpose of enforcement of these arrearages the bond shall remain in full force

and effect. If the mother and the person alleged to be the father should intermarry at any time after the conception or birth of the child, the child shall in all respects be deemed and held legitimate and any bond executed hereunder shall likewise be deemed void, and any proceedings hereunder shall abate.

64. Application of Civil Practice Act—Pleading.) Section 14. The provisions of the Civil Practice Act and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder except as otherwise specifically provided in this Act.

No matters not germane to the purpose of a proceedings under this Act shall be introduced by answer, joinder, counterclaim or otherwise.

65. Repeal—Saving Clause.) Section 15. The following Act is repealed: "An Act concerning bastardy", approved April 3, 1872, as amended.

The repeal of said Act shall not affect rights or liabilities which have accrued thereunder and which have been determined, settled or adjudicated prior to the effective date of this Act or which are the subject of proceedings pending thereunder on such effective date. No such pending proceedings shall abate, but on the contrary such proceedings shall be continued under the provisions of the Act herein repealed for which purpose said Act shall be deemed to remain in full force and effect.

66. Title of act.) Section 16. This Act shall be known and may be cited as the "Paternity Act."

Ill. Rev. Stat. 1961, Chap. 106¾, Sec. 1 et seq.

C.

Opinion

January 21, 1970
Rehearing Denied March 23, 1970
44 Ill. 2d 412, 255 N.E. 2d 900

MR. JUSTICE CULBERTSON delivered the opinion of the court:

James Joiner, the defendant, here appeals directly from various orders of the circuit court of Winnebago County on the theory that the constitutionality of the Paternity Act (Ill. Rev. Stat. 1961, ch. 106¾, pars. 51 *et seq.*) is involved. Plaintiff, Rosetta Deckard, questions the timeliness of the appeal, thus raising a question of our jurisdiction, and it is to this issue that our consideration must first be directed.

For purposes of this opinion, it may be said that the litigation had its origin on March 27, 1962, when plaintiff filed an amended complaint alleging that defendant was the father of a child born to her out of wedlock on January 17, 1962, and praying that he be ordered to pay support for the child and the expenses incurred as the result of the pregnancy. Also filed was an acknowledgment of paternity signed by defendant, upon whom a *capias* had been served. An order entered the same day manifested a finding that defendant was the father of the child and found him liable for support and expenses. Apparently due to the circumstance that defendant was then unemployed, determination of the amount of support and expenses was reserved, but defendant signed an enforcement bond in the amount of $1,000 as contemplated by section 10 of the Paternity Act. (Ill. Rev. Stat. 1961,

ch. 106¾, par. 60.) Subsequently, a hearing was held February 25, 1963, which culminated with an order finding that defendant had obtained employment and directing him to pay doctor and hospital bills and support of $15 per week. Defendant was given notice, but did not appear.

Phase two of the litigation, having to do with the enforcement of the support order, started 3½ years later on August 18, 1966, when plaintiff filed a petition for a contempt citation wherein it was alleged that defendant had not complied with the prior order and was $2,645 in arrears for support. As we interpret the record, this petition was abandoned. About a year later, on September 1, 1967, a petition for a rule on defendant to show cause was filed, wherein it was alleged that the arrearage for support was $3,000. Following a hearing held the same day, at which both parties and their counsel were present, an order was entered finding defendant in contempt and ordering that he pay expenses for which defendant was liable. (*Cf. Walters* v. *Mercantile Nat. Bank of Chicago*, 380 Ill. 477.) But this phase of the controversy did become final with the entry of the order of February 25, 1963, which resolved the remaining issue and fixed the amount of support defendant was to pay. This was the final determination of the ultimate rights of the parties put in issue by the complaint, and the only matters left for the court, such as the enforcement of its support order or the increase of support if the need arose, were only incidental to the matters adjudicated in the 1962 and 1963 orders. No timely appeal was taken from those orders and that branch of the controversy was closed. And this is so despite the effort of defendant, in excess of four years later, to attack the orders by

motions to vacate them and to vacate the acknowledgment of paternity upon which they were in part based. Not only had the court lost jurisdiction to entertain such motions after 30 days (Ill. Rev. Stat. 1967, ch. 110, par. 72), but the mere filing of a motion to vacate after the time for appeal had passed could not have had the effect of rendering the orders interlocutory. (*Cf. Diebler* v. *Bernard Bros., Inc.*, 385 Ill. 610; *Lenhart* v. *Miller*, 375 Ill. 346.) Accordingly, we have no jurisdiction to review the 1962 and 1963 orders in this appeal.

This brings us to the second branch, or phase, of the litigation, *viz.*, the efforts to enforce the support order, which emanated from the petition for a rule to show cause, filed September 1, 1967. Giving defendant the benefit of every doubt, we think it fair to state from the succession of orders heretofore set forth, that this branch of the controversy was finally settled and determined on August 18, 1968, when the court denied the motion of defendant to vacate the order and judgment of December 1, 1967, which had ruled upon the issues raised by the petition and had disposed of the only pending motion. Under the compulsion of Rule 303(a) of this court (Ill. Rev. Stat. 1967, ch. 110A, par. 101.303(a)), defendant, to perfect a timely appeal, was required to file notice of appeal within 30 days from the August order disposing of his motion. This he did not do. Instead, on the 28th day, he filed a new and general motion to vacate and dismiss which was merely a consolidation and repetition of all his prior unsuccessful motions. Bearing in mind that the rights of an infant are involved, whom defendant has wilfully failed to support for a period now approaching seven years, it is our opinion that the latter motion cannot fairly or properly

be treated as having purged himself by immediately commencing to pay support of $15 per week. The same order directed that the "petition was continued" to October 26, 1967.

When the latter date arrived, defendant's present counsel entered his appearance and, after a further hearing, the petition was again "continued" to November 2, 1967. On the same day (October 26), and apparently after the hearing so far as the order of the record is concerned, a motion was filed on defendant's behalf to vacate the contempt (September 21, 1967), support (February 5, 1963), and paternity (March 27, 1962) orders, and to dismiss the action. As grounds therefore it was alleged, among other things, that the Paternity Act is unconstitutional, that defendant was deprived of constitutional rights in various ways at various times, that the Act was not complied with and that the original complaint failed to state a cause of action. Several days later he filed a second motion to vacate the appearance of an attorney who had initiated the September, 1967, contempt proceeding on plaintiff's behalf, the gist of the motion being that only the State's Attorney could represent plaintiff and initiate such a proceeding. After hearings, orders were entered on November 24, 1967, denying both motions, the order relating to the motion to vacate and dismiss containing an express finding that the Paternity Act is constitutional and valid.

On December 1, 1967, defendant filed a repudiation of the acknowledgment of paternity which had been filed March 27, 1962, and also a motion to vacate and set aside such acknowledgment. On the same day, a further hearing on the petition for a rule to show cause was held before a judge other than the one who had

conducted the prior hearing, and culminated with an order which denied the request that defendant be held in contempt, but directed that plaintiff have judgment against defendant for $3,090. The same order, apparently referring to defendant's motion to vacate the acknowledgment, the only motion then pending, broadly directed: "That the motion to vacate orders and for other relief be denied." And although this order was entered and dated December 1, 1967, it was not filed until December 29, 1967. (See: *Anastaplo* v. *Radford,* 14 Ill. 2d 526.) On January 2, 1968, defendant filed a motion to vacate this order on various nonconstitutional grounds. The latter motion was not heard until June, 1968, and was denied by an order entered August 16, 1968.

Twenty-eight days later, on September 13, 1968, defendant climaxed the labyrinth of pleadings by filing a motion to vacate all orders and judgments in the proceeding, and to dismiss the action, again alleging the unconstitutionality of the Act and the grounds which had been previously advanced in support of his prior unsuccessful motions. In short, two days before a notice of appeal was due, defendant sought to raise anew each and every question which had previously been decided against him. This motion was denied October 4, 1968, and on November 1, 1968, defendant filed a notice of appeal which specifically set forth and purported to be taken from each and every order entered in the cause from its inception in 1962 until the order of October 4, 1968, denying his last motion to vacate.

We think it manifest that the appeal comes too late insofar as the order of March 27, 1962, finding paternity and liability, and the order of February 25, 1963, fixing the amount of support, are concerned. And this is so

even though we recognize that the court retained jurisdiction of the cause under the provisions of section 9 of the Paternity Act (Ill. Rev. Stat. 1961, ch. 106¾, par. 59), to make such new orders for support, maintenance and education as from time to time deemed necessary. When the paternity and support orders were entered sections 76 and 77 of the Civil Practice Act, since superseded by Rules 303(a) and 302 of this court, were controlling and provided in pertinent part that no appeal could be taken from a final order, judgment or decree unless notice of appeal was filed within 60 days from the entry thereof. (Ill. Rev. Stat. 1961, ch. 110, pars. 76, 77). It has been consistently held that a determination is final within the contemplation of these sections if it finally disposes of the rights of the parties, either on the entire controversy or a separate branch thereof (*Roddy* v. *Armitage-Hamlin Corp.*, 401 Ill. 605; *Altschuler* v. *Altschuler*, 399 Ill. 559; *Moffat Coal Co.* v. *Industrial Com.*, 397 Ill. 196), and that an order is nonetheless final for purposes of review where matters left for future determination are merely incidental to the ultimate rights which have been adjudicated by the judgment or decree. *Eich* v. *Czervonko*, 330 Ill. 455; *Groves* v. *Farmers State Bank*, 368 Ill. 35; *DeGrasse* v. *Gossard Co.*, 236 Ill. 73.

In the present case it may be conceded that the paternity order of March 27, 1962, was not a final and appealable order because it provided that jurisdiction would be retained for the determination of a matter of substantial controversy between the parties, *viz.*, the amount of support and rendered the prior orders interlocutory, and thus to have delayed and extended the time for filing notice of appeal. To hold to the contrary

would not only violate the spirit of our rule, which contemplates the prompt and orderly prosecution of an appeal, but would render it a nullity. As occurred in this case, any party could defeat the rule and delay appeal merely by filing successive and repetitious motions to vacate. When confronted with a similar circumstance in *Martin* v. *Masini,* 90 Ill. App. 2d 348, the court made the following comment to which we fully subscribe: "We do not believe that the filing of a second motion or petition attacking the original order may be utilized to extend the time on appeal. *Weaver* v. *Bolton,* 61 Ill. App. 2d 98, 103, 209 N.E. 2d 5 (1965). The last motion or petition contained nothing that was not in the first motion or could not have been included therein. Neither motion purported to be under Section 72, nor did they contain the required allegations for relief under this section. They were merely attempts to have the trial court review its own orders after thirty days, which it cannot do. Such motions or petitions may not be utilized to toll the time for appeal. *In re Estate of Schwartz,* 63 Ill. App. 2d 456, 460, 212 N.E. 2d 329 (1965)." (90 Ill. App. 2d at 355.) We conclude, therefore, that the notice of appeal was not filed in apt time and that we are without jurisdiction to entertain the appeal.

Although the result we have reached requires that the appeal be dismissed, we feel impelled to comment that the brief of defendant would not permit us to consider the claim that the Paternity Act is unconstitutional, or his contention that he was deprived of constitutional rights. No authorities have been cited in support of either proposition and the argument presented is little more than bare assertions of the issues sought to be raised. Such a brief fails to comply with the standards

fixed by the rules of this court, and would preclude our consideration of the points thus raised. *Village of Roxana v. Costanzo*, 41 Ill. 2d 423.

Appeal dismissed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 288

JAMES JOINER,

Petitioner,

vs.

ROSETTA DECKARD,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Your Respondent, Rosetta Deckard, prays that the Writ of Certiorari be denied for having been legally and properly adjudicated in the Circuit and Appellate Courts of the State of Illinois.

JURISDICTION.

Your Respondent believes that there is no federal question to be sought under review because there is nothing repugnant in the Statute under attack and because the Petitioner failed to properly preserve his right to appeal from the Circuit Court of the 17th Judicial District to the Supreme Court of Illinois and thus lost all right of appeal to this Supreme Court.

STATEMENT OF THE CASE.

It is true that the Defendant was requested to sign an acknowledgement of paternity on March 27, 1962. By the signing of said acknowledgement he waived the examination of the complainant as provided by Paragraph 55 of the Revised Statutes as printed in the Petitioner's Brief. The Court did not take any evidence on that day concerning the support, maintenance, education and welfare of the mother or child because the Defendant was then unemployed.

An Amended Order was entered on February 5, 1963, providing for support, since the Defendant had obtained employment at D. C. Electronics in Rockford, Illinois.

On August 16, 1966, a Petition for Contempt was filed by the Plaintiff, the Defendant then being represented by an attorney. The Court heard testimony on August

25, 1966, concerning the amount of back support and continued the Petition to September 30, 1966. No further action was taken on this Petition until the Plaintiff filed on September 21, 1967, a further Petition for Rule to Show Cause.

The Defendant was represented by a second attorney on September 21, 1967, at which time the Court found the Defendant in contempt and ordered him to purge himself by the payment of Fifteen Dollars ($15.00) per week. The Court continued the Petition as it related to the arrearages to October 26, 1967.

On October 26, 1967, the Defendant sought and employed his third attorney who has since prosecuted this appeal.

On October 26, 1967, the Defendant filed a Motion to Vacate for the following reasons:

"1. The Paternity Act is unconstitutional.

2. The Paternity Act violates the Fourteenth Amendment to the Constitution of the United States, and also Sections 2 and 12 of Article II of the Constitution of the State of Illinois.

3. The provisions of the Paternity Act relating to the issuance of a warrant, arrest, bond, imprisonment for neglect to give bond, and security, contempt of court, and imprisonment for contempt are incidents of a criminal prosecution."

All of the other grounds given for reversal by this appeal and as contained in the appeal to the Supreme Court of Illinois were contained in that motion which was filed on October 26, 1967.

The Motion to Vacate was denied at a hearing on November 17, 1967, and the formal order entered thereupon on December 1, 1967.

No appeal or notice of appeal was filed by the Defendant until November 1, 1968. As the Supreme Court of Illinois indicated in their decision, the Defendant attempted at a later date *after his time for appeal had expired* to file further motions based upon the same grounds as those contained in his motion of October 26, 1967 to revive his right to appeal without leave of Court to do so. The written order dated December 1, 1967 specifically provides "that the Motion to Vacate orders and for other relief be denied."

POINTS AND AUTHORITIES.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

Cornmesser v. *Laken*, 43 Ill. App. 2d 324, 193 N.E. 2d 337 (1963), aff'd. 379 U.S. 822.

Eich v. *Czervonko*, 330 Ill. 455, 161 N.E. 864 (1928).

Groves v. *Farmers State Bank*, 368 Ill. 35, 12 N.E. 2d 618 (1938).

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. Your Respondent fully believes that the Defendant has not properly preserved his right to appeal on more than one occasion and will make this argument at the end of a response to the reasons cited for granting the Writ by the Defendant.

Reason No. 1 given by the Petitioner is that the Paternity Act is "unconstitutional" and cites the sections of the Constitutions upon which this argument is derived.

The Paternity Act of 1957 as printed in the Petition is a redrafting of a bastardy act that has existed in Illinois practically since the creation of the State of Illinois. The prime purpose of both of these acts is to determine the putative father and to provide support for the illegitimate child. *Cornmesser* v. *Laken,* 43 Ill. App. 2d 324, 193 N.E. 2d 337 (1963), aff'd. 379 U.S. 822.

The issuance of a warrant or the apprehension of the Defendant is not for the purpose of imprisoning the Defendant but to bring the Defendant before the Court to answer the charges filed by the mother. There is no evidence in the record that Mr. Joiner, the Defendant, was deprived of his liberty or that he was in fact imprisoned. These provisions surely do not violate the federal or state constitutions. No cases are cited in support of this argument.

The Paternity Act does afford an orderly and regular mode of procedure by due process of law, that the Defendant shall have notice, and that the Defendant be granted an opportunity to be heard in his defense.

The Defendant, Mr. Joiner, was not committed to the County Jail for failure or neglect to give bond or security but, in fact, did give a recognizance bond without sureties in the sum of One Thousand Dollars ($1,000.00).

2. There is nothing in the arguments of Point No. 2 to connect with a violation of, or repugnance of, a federal constitution.

3. The complainant filed a Verified Complaint on March 27, 1962, and the Defendant was first brought to Court on March 27, 1962. This could certainly be said, as it was by the Supreme Court of Illinois, to be the date of origin of the litigation. Defendant's failure to file a Motion to Strike or to respond in defense at that time has been waived now that the Statute of Limitations for the Paternity Act has expired.

There is absolutely no doubt that the Defendant acknowledged the paternity of the child and at no time filed a repudiation or motion to set aside his acknowledgement dated March 27, 1962 until he filed a repudiation on December 1, 1967, well past the two-year statute of limitations and a safe period of time for the Defendant, well knowing that the Plaintiff could not reinstitute this action. It should also be noted that the Defendant was in Court on several occasions subsequent to the acknowledgement of paternity, and at no time did he or his various attorneys repudiate or attempt to repudiate the acknowledgement of paternity. As a matter of fact, at no time did he or his attorneys object to the procedures that were being followed or file motions to set aside the orders of the Court based upon any alleged violations of the Paternity Act. Certainly, this white, intelligent, adult male with two accomplished attorneys admitted to the

practice of the State of Illinois would have filed a repudiation or motion to set aside or vacate these orders if there had been any doubt in his mind as to the real paternity of this child.

It was not until he hired the services of Attorney John Snively that he suddenly realized that after all those years he was not the father of the illegitimate child. It would certainly be a travesty of justice if this or any other Court would deny the interests of the mother or the child by a denial of paternity some five (5) years after the child was born and after ample opportunity within which to preserve any rights that he had by virtue of the due process of law.

Your Respondent, however, refutes the arguments of Defendant in several respects. First, the Court need not examine the woman under oath in the event that the Defendant acknowledges paternity in writing. Second, the accused did have an opportunity to controvert the charge and was certainly advised of his rights by the Court. Third, he did have an opportunity to submit to a blood test and certainly the Court advised him of his right to do so. Fourth, he was obviously advised relative to acknowledgement of paternity and the effect of it, because it was discussed at that time that the Defendant was not then employed and that the Court would have to continue the time for the entering of a money order for support because of this unemployment. There is nothing in the record to indicate that this adult male was unable to read his acknowledgement, and there is nothing in the record to indicate that he was not advised of his rights. Fifth, evidence need not be heard by the Trial Court once a Defendant acknowledges paternity. Sixth, the Court did continue the matter for further hearing as is the Court's right.

4. All of these arguments were contained in Argument 3 of Petitioner's Brief, and are not supported by the evidence, by the Report of Proceedings or by anything contained in this Brief. There is nothing to indicate that anything other than fair play and due process was involved at the time of the original hearing thereupon and subsequent hearings. The Defendant has the right to waive many of the complaints contained in said argument and, in fact, did so by the acknowledgement of paternity.

5. The Amended Order of February 5, 1963 finds that the Court did find on March 27, 1962 that the Defendant was found to be the father of James Curtis Deckard, a child born out of wedlock on January 17, 1962. This Amended Order of February 5, 1963 was never appealed from nor was any motion entered thereupon until October 26, 1967, more than four and one-half years subsequent to the entry of said Amended Order.

6. The Amended Order did render a judgment on February 5, 1963.

7. It is conceded that the State's Attorney instituted the paternity proceeding, and it is proper for the State's Attorney to represent the Plaintiff.

There is nothing in the Paternity Act, however, to prohibit a privately employed attorney from representing a complaining mother.

Certainly, her rights are not limited because she employs a private attorney, and at no time has the State's Attorney of Winnebago County entered any objection or refusal to allow her this privilege.

However, if the State's Attorney is still a party to this lawsuit, then the Defendant has not perfected his

appeal, because the State's Attorney of Winnebago County would be an essential party to this proceeding and notice of appeal should have been filed upon the State's Attorney in order to perfect the appeal.

It is clear from a reading of the Abstract of Record, and it is true, that the State's Attorney of Winnebago County has not been served with notice of appeal and has not been made a party to this appeal as required by statute.

Certainly, there is not a denial of due process of law of the Defendant by virtue of the Plaintiff's selecting a private attorney to seek enforcement of orders which had been entered against the Defendant.

8. The question of whether or not the Plaintiff is entitled to a judgment against the Defendant is not a question properly raised before this Court since it does not involve a violation or repugnance of the Constitution of the United States. This is one more remedy allowed to a mother to collect support under the Paternity Act. The Defendant had filed a bond which was by recognizance only and without sureties. Certainly, this was to the advantage of the Defendant and that the Court did not require sureties and a more collectible bond is not a denial of due process to the Defendant who is thus saved that responsibility and cost.

To attempt to collect, however, from the recognizance bond without surety would be a waste of time and effort. The Defendant was in arrears and has not argued at any time before the Circuit Court, the Illinois Supreme Court, or this Court that the amount is incorrect or that the Judge refused to allow him testimony in determining the amount or that in any way he was denied due proc-

ess by the entering of this amount as a correct amount due to the Plaintiff. Certainly, the Plaintiff was legally entitled to recover the amount which had not been paid by the Defendant.

9. The appeal was not taken in ample time. A final judgment was entered on March 27, 1962 finding the Defendant to be the father of the illegitimate child. A second final order was entered on February 5, 1963. Proceedings under the Paternity Act are civil in nature and governed by the provisions of the Civil Practice Act except as otherwise specifically provided in the Paternity Act and is thus subject to the time limitations provided in the Civil Practice Act for appeal. *Cornmesser v. Laken*, 43 Ill. App. 2d 324, 193 N.E. 2d 337 (1963); Ill. Rev. Stat. 1961, 106¾, Sec. 64.

Section 303 (Supreme Court Rule 303), Ill. Rev. Stat., Chap. 110(a)—Practice Rules, provides as follows:

> "(a) TIME. Except as provided in Paragraph (b) [not applicable to this case] below, the notice of appeal must be filed with the Clerk of the Circuit Court within thirty (30) days after the entry of the final judgment appealed from, or, if a timely post-trial motion directed against the judgment as filed, whether in a jury or a non-jury case, within thirty (30) days after the entry of the order disposing of the motion."

At the time of the 1962 and 1963 orders this time for appeal was sixty (60) days.

It is apparent, therefore, that the appeal from the 1962 or 1963 orders was too late. Those orders were final for purposes of review even though matters may have been left for future determination, such as enforcement of orders, and which are merely incidental to the ulti-

mate rights which have been adjudicated by the judgment or decree. *Eich* v. *Czervonko*, 330 Ill. 455, 161 N.E. 864 (1928); *Groves* v. *Farmers State Bank*, 368 Ill. 35, 12 N.E. 2d 618 (1938).

The entry of the order of February 5, 1963 fixing the amount of support was the final determination of the ultimate rights of the parties put in issue by the Complaint and Amended Complaint, and the time for appeal began as of that date. It is the contention of Respondent that the Supreme Court of Illinois was correct in stating that that Court and this Court had lost jurisdiction to entertain that and this appeal.

The motion of Defendant to vacate the 1962 and 1963 orders filed by the Defendant on October 26, 1967 was denied by the Court on November 24, 1967 in an order entered on December 1, 1967 which order denied completely the relief prayed for in the October 26, 1967 motion which as was earlier said in this brief claimed that the Paternity Act was unconstitutional, violated the 14th Amendment to the Constitution of the United States and contained all of the points raised by this appeal and by the appeal to the Supreme Court of Illinois.

The Defendant did not file an appeal from this order until November 1, 1968. Instead, throughout the course of the next year he filed numerous repetitive, unsuccessful, motions, and, finally, on November 1, 1968 filed for the first time a notice of appeal.

Respondent is not sympathetic to the claim made by the Defendant that he was treated unfairly and without due process of law. The Plaintiff sought the services of the State's Attorney of Winnebago County to recover for her support from the Defendant upon becoming pregnant. The Defendant appeared in Court and openly ac-

knowledged that he was the father of the child. He was subsequently ordered to pay support and failed to make all of the payments required by him requiring the filing of various petitions for contempt. He was represented by two attorneys prior to the filing of various motions by Attorney John Snively. Ample time was given to him to renounce his acknowledgement of paternity, and various avenues of relief were available to him despite his present plea that he was unduly served by the law.

What of the Plaintiff and of the child? The Paternity Act as reprinted in Petitioner's Brief limits the Plaintiff's right to relief to a period of two years from the date of birth of the child or from two years from the acknowledgement of the child by the reputed father. Paragraph 54, Paternity Act, on pages 5(a) and 6(a) of Petitioner's Brief. Since the two-year Statute of Limitation has expired, the Defendant would certainly violate the due process of law granted to the Plaintiff and to the child, should his appeal be allowed. It was the Defendant who was in Court and acknowledged paternity. It was the Defendant who had ample opportunity to file an appeal within the appeal period and within the period of limitation for the Paternity Act. It was the Defendant who hired three separate attorneys to protect his interests, the first two of which did not move to vacate judgment or move to repudiate paternity. The Defendant has had his rights protected but has failed to act within the time limitations granted to him for appeal. Certainly, the child and Plaintiff should not now be somehow punished because of the Defendant's failure to perfect his appeal properly or deny paternity at the opportunities given to him. The time for appeal cannot be revised by the maneuverings of an attorney who has failed to properly preserve his right to appeal.

CONCLUSION.

The Circuit Court of the 17th Judicial Circuit of Illinois and the Supreme Court of Illinois have upheld the orders requiring the Defendant to pay support for the illegitimate child whom he voluntarily acknowledged to be his.

The Defendant has failed to properly preserve or perfect his appeal or to object or file appeal within a timely period.

There has been no substantial denial of the constitutional rights of the Defendant, and the Paternity Act of Illinois has not violated the due process of law to which the Defendant should be accorded.

There is nothing in the Petition of the Defendant to sustain his argument, and no cases have been cited by him to indicate the correctness of his position.

For the reasons stated, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 288

JAMES JOINER,

Petitioner,

vs.

ROSETTA DECKARD,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes James Joiner, the petitioner herein, and presents his petition for rehearing in the above entitled cause, upon the grounds, and for the reasons hereinafter set forth:

1. The practice and procedure following the apprehension of the accused is jurisdictional.

A proceeding to establish the paternity of a child born out of wedlock and to establish and enforce liability for its support, maintenance, education and welfare may be instituted in a court having jurisdiction of certain cases. (Ill. Rev. Stat. 1961, Chap. 106¾, Par. 54.) Such action may be instituted only on the filing of a complaint in writing by the mother of a child born out of wedlock, or by a woman who is pregnant with child, which, if born alive, may be born out of wedlock, accusing, under oath or affirmation, a person with being the father of such child. The several State's Attorneys within their respective counties shall, upon the request of such woman, file the complaint on her behalf and proceed forthwith in the enforcement of the Act.

Upon the filing of a complaint * * *, under oath or affirmation, the court shall thereupon issue a warrant for the apprehension of the defendant, * * * which may be served * * * in any county. (Ill. Rev. Stat. 1961, Chap. 106¾, Par. 55.) Upon the appearance of the accused and in his presence, the Court shall examine the woman, upon oath or affirmation, on the charge that he is the father of the child. The accused shall have the right to controvert the charge, and evidence may be heard as in other cases within the jurisdiction of the Court. If the court is of the opinion that no sufficient cause is established it shall dismiss the complaint and discharge the accused. The accused shall have the right to submit to a blood test. If the accused so submits himself, the court shall order such test administered. If the blood test shows that the accused is not the father of the child as alleged in the complaint, the accused shall be discharged forthwith by the court. If the accused admits the charge, or waives examination of the complainant, or

if after the accused has controverted the charge, the court, upon examination, determines that sufficient cause appears, it shall bind the accused person, in bond, with sufficient security, to appear in court on a designated return day occurring within 30 days from the date of the bond, or as soon thereafter as the court is in session, and from day to day after the time so designated, until the final order or judgment of the court, to answer the charge and to abide the final order or judgment and not to depart without leave, to which court the bond shall be returned. In neglect or refusal to give bond and security, the court shall commit the accused to the county jail, there to be held to answer the complaint. * * *

In an order filed on February 3, 1962, the trial court authorized the sheriff to take the defendant into custody and bring him before the court forthwith. R.C5. A capias was issued. R.C7. He was arrested on March 26, 1962.

The record discloses that the trial court failed to follow the practice and procedure set forth in the Act.

First, the defendant was first brought before the trial court on March 27, 1962, but upon his appearance the court did not examine the woman, upon oath or affirmation, on the charge that he was the father of the child.

Second, the accused did not have an opportunity to controvert the charge, nor was he advised of his right to do so.

Third, he did not have an opportunity to submit to a blood test, nor was he advised of his right to do so.

Fourth, he was not advised relative to the acknowledgment of paternity submitted to him and the effect thereof.

Fifth, evidence was not heard by the trial court.

Sixth, the trial court did not bind the accused person, in bond, with sufficient security, to appear in court on a designated return day occurring within 30 days from the date of the bond, or as soon thereafter as the court is in session, and from day to day after the time so designated, until the final order or judgment of the court, to answer the charge and to abide the final order or judgment and not to depart without leave, to which court the bond shall be returned.

The practice and procedure was not in accordance with the provisions of the Act. Clearly, the trial court lacked jurisdiction to proceed with the proceeding. The failure of the trial court to follow the practice and procedure is a jurisdictional defect. (*Brown* v. *Box*, 38 Ill. 2d 80, 230 N.E. 2d 204 (1967), *Alsen* v. *Stoner*, 114 Ill. App. 2d 216, 252 N.E. 2d 488, 493 (1969).)

2. There was a substantial denial of the constitutional rights of the petitioner.

First, he was not warned of his absolute right to remain silent. He was not warned that anything that he said would and could be used against him in court. He was not advised of his right to the assistance of counsel. (*Brown* v. *Box*, 38 Ill. 2d 80, 230 N.E. 2d 204 (1967).). He was not advised that if he is not able to employ counsel, the court will appoint counsel for him. He did not understandingly waive his right to remain silent or to counsel. He was deprived of his right to counsel.

Second, he did not understand the nature and cause of the accusation against him. He was in ignorance of his rights and of the consequences of his acts.

Third, he did not understandingly waive examination of the woman or his right to controvert the charge. He did not understandingly waive his right to a blood test.

Fourth, he was not furnished with a copy of the amended complaint nor was it read to him.

Fifth, the case was not at issue. He had a right to file an answer to the amended complaint. He was not ruled to answer the complaint. There was no entry of an order of default. The trial court had no right to proceed.

Sixth, he was not advised of his right to a trial by jury. (Ill. Rev. Stat. 1961, Chap. 106¾, Par. 56.) He did not understandingly waive his right to a trial by jury.

Seventh, he was not advised relative to an acknowledgment of paternity and the effect thereof.

It was the duty of the trial court to admonish the petitioner as to the nature of the charge against him, and the consequences thereof and his right to counsel and a trial by jury. (*People ex rel. Adams* v. *Sanes*, 41 Ill. 2d 381, 385, 243 N.E. 2d 233 (1968), *Alsen* v. *Stoner*, 114 Ill. App. 2d 216, 252 N.E. 2d 488 (1969).) Clearly, grave questions are raised relative to the fundamental fairness of the proceeding.

It is submitted that there was a flagrant denial of due process of law.

3. The purported judgment that the defendant is the father of the child is void.

If the defendant has acknowledged that he is the father of the child, either at the preliminary hearing * * * or at the subsequent trial of the issue, which acknowledgment he has not repudiated at the trial of the issue, or if on the trial of the issue the court or jury as the case may be, finds that he is the father, the court shall enter judgment to that effect. (Ill. Rev. Stat. 1961, Chap. 106¾, Par. 59.)

The record fails to disclose that there was a preliminary hearing or a subsequent trial of the issue. It does, however, disclose that the defendant filed a repudiation of the purported acknowledgment of paternity filed on March 27, 1962. R.C31. In a motion filed on the same day, he moved to vacate the purported acknowledgment of paternity because he had repudiated the same. R.C12. It was denied.

The statute is mandatory. (Ill. Rev. Stat. 1961, Chap. 106¾, Par. 59.) The trial court must enter judgment.

As shown in *DiBella* v. *Cuccio,* 15 Ill. 2d 580 (1959), and *Alsen* v. *Stoner,* 114 Ill. App. 2d 216, 252 N.E. 2d 488 (1969), the trial court entered judgment finding the defendant to be the father of the child. They acted in compliance with the statute, as the trial court should have done in this case.

Here, the judgment was not entered. The trial court failed to comply with the statute. A void judgment is always subject to attack.

The judgment of the court below must be vacated and the cause remanded.

Conclusion.

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, the petitioner prays that this Court grant a rehearing of the order of denial entered on December 7, 1970, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

JOHN R. SNIVELY,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58 (2).

JOHN R. SNIVELY,
Counsel for Petitioner.